

# Decision Notice 152/2019

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## **Business and Financial Review of East Renfrewshire Culture and Leisure**

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**The Applicant**

**Public authority: East Renfrewshire Council**

**Case Ref: 201802058**



Scottish Information  
Commissioner



## Summary

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The Council was asked, among other items, for the Business and Financial Review of East Renfrewshire Culture and Leisure and for related correspondence. The report was withheld under section 33(1)(b) of FOISA and the Council advised that it no longer held any related correspondence.

The Commissioner investigated and found that some parts of the Review were exempt from disclosure, but that other parts should be disclosed.

He found that, on the balance of probabilities, the Council did not hold related correspondence and that the Council had failed to respond to the review requirement within 20 working days.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Information is not held); 21(1) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 7 August 2018, the Applicant made a request for information to East Renfrewshire Council (the Council). He asked for information relating to the East Renfrewshire Culture and Leisure Trust (the Trust). Specifically, he sought a copy of the report of a Council-commissioned Business and Financial Review of the Trust (undertaken by Solace in Business) and a copy of an action plan following on from the report. He also asked for any correspondence relating to this matter, between Council employees, Councillors, the Trust and others.
2. The Council responded on 7 September 2018, withholding the report under section 33(1)(b) of FOISA (Commercial interests and the economy) and the action plan under section 27(1) (Information intended for future publication), and advising that it held no related correspondence (section 17(1) of FOISA).
3. On 9 September 2018, the Applicant wrote to the Council, requesting a review of its decision on the basis that:
  - (i) the Council had not properly considered the public interest test in relation to the exemptions in sections 33(1)(b) and 27(1) of FOISA
  - (ii) it had responded to his request outwith the 20 working day period allowed under section 10(1) of FOISA and
  - (iii) he believed the Council should hold communications relating to the report.
4. The Council provided the Applicant with a copy of the action plan on 20 September 2018. It subsequently notified him of the outcome of its review on 9 October 2018, upholding the application of section 33(1)(b) of FOISA to the report and confirming that it held no further

information. The Council acknowledged that it had been late in responding to the Applicant's original request and had neglected to address the public interest test, and apologised for this.

5. On 25 November 2018, the Applicant wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he:
  - (i) noted that the Council's response to his review requirement had been made outwith the 20 working day period allowed under section 21(1) of FOISA
  - (ii) believed that the Council should hold further information relating to the matter and
  - (iii) did not accept that the Council could justify withholding information under section 33(1)(b) of FOISA.
6. All three of these points are addressed in this decision.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the Council to review its response to that request before applying to him for a decision.
8. On 9 January 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions relating to the matter set out in paragraph 5.
10. The Applicant was also asked for his submissions on the public interest and for any other comments he wished to make.
11. Both the Council and the Applicant provided the investigating officer with submissions. The Council also provided comments from the Trust on the impact of disclosure of the information.

## **Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Section 21(1) of FOISA – Review by a Scottish public authority**

13. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to qualifications which are not relevant in this case.
14. The Council notified the Applicant of the outcome of the review 22 working days after receipt of the requirement to comply with the review.

15. Therefore, the Commissioner must find that in this respect the Council failed to comply with section 21(1) of FOISA.
16. As noted above, the Council's failure to respond timeously to the original request was acknowledged (and apologised for) in the review outcome.

### **Section 17(1) of FOISA – Information not held**

17. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
18. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
19. The Commissioner's remit is to investigate and reach a determination on information held by a Scottish public authority, including whether any relevant information is held. He cannot comment on what information the Council ought to hold, but he can consider whether the Council took adequate, proportionate steps to identify and locate information in response to the Applicant's request.
20. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches and investigations carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

#### *The Council's submissions*

21. The Council explained that the Applicant's request was passed to its Education Department (which has responsibility for liaison with the Trust) for clarification of any other Council departments or individuals who may have had involvement in the issue and, on confirmation of such other services or individuals, the request was also passed to them. The report was commissioned by the Education Director and she confirmed that no structured file existed, the communication having been undertaken electronically between her and the consultant involved.
22. Having identified the relevant personnel involved in the issue, searches were then conducted on the Microsoft outlook accounts of those individuals by the individuals themselves using search terms as outlined below. These searches were made of e-mail boxes and documents electronically stored.
23. The individuals concerned were the Director of Education, Chief Finance Officer and Chief Executive and their respective secretarial assistants. "SOLACE", "SOLACE in Business", "Business and Financial Review of East Renfrewshire Culture and Leisure", "Trust Business Review" and "Leisure Trust Review" were the search terms used. No time periods were set on the searches.
24. The Council stated that the initial retention or otherwise of e-mails falls to the individual recipient and is based on operational significance. The Director (who was the primary officer involved) confirmed that her communications with the consultant were deleted as the draft

developed, their operational significance having been diminished by the production of the new version.

25. The Council provided the Commissioner with a copy of its e-mail retention policy. The policy states that all emails should be deleted when they become three months old, except where they require to be retained to meet a particular business need.
26. The Commissioner must take account of the fact that the communications sought by the Applicant concerns a draft report dated May 2016. The request for the information was made in August 2018. Given the submissions he has received, and Council's retention policy, it is reasonable to accept that emails created and sent discussing a draft report created more than two years before the Applicant's information request were likely to have been deleted by the time of the information request.
27. The Commissioner has considered the searches carried out by the Council and must conclude, on the balance of probabilities, that the likelihood of any emails from the period in question being retained is slim. He can only reach a finding on whether any emails are held and not on whether they *should have been* retained.
28. In all the circumstances, the Commissioner is satisfied that the Council took adequate, proportionate steps to identify whether or not it held information falling within the scope of the Applicant's information request, and he finds that the Council was correct to give notice under section 17(1) of FOISA that the information was not held.

### **Section 33(1)(b) of FOISA – Commercial interests and the economy**

29. The Council submitted that the information sought by the Applicant was exempt from disclosure in terms of section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
30. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
  - (i) whose commercial interests would (or would be likely to) be harmed by disclosure
  - (ii) the nature of those commercial interests and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
31. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

#### *Submissions from the Council*

32. The Council pointed out that the recommendations of the report were published in full in the action plan which had been through the Council's Audit and Scrutiny Committee, the papers for which were published on the Council website and as such were in the public domain. (As

noted above, the Council provided the Applicant with a copy of the action plan on 20 September 2018.)

33. The full terms of the withheld report, the Council explained, were known only to members of the Trust Board and its Chief Executive and to certain members of the Council's own Corporate Management Team with specific interest in its content, i.e. the Chief Executive, the Director of Education and the Chief Finance officer.
34. The Council argued that much of the content was not in the public domain, stating that, while there was financial information about the Trust already in the public domain, it was not broken down into service areas to the same degree, nor did it provide the same level of detail as in the report.
35. The Council went on to explain that Trust Board did not accept much of the content of the report (in the analysis and conclusions) and refused to sign it off. It submitted that there was, therefore, in the Trust's eyes, a strong commercial interest in the report not entering the public domain, given what were perceived to be inaccuracies within its analysis which might undermine public confidence in the Trust's ability to provide services, with a knock-on effect on its commercial attractiveness and customer base.
36. In particular, the Council submitted that the financial context information was sensitive. The information in Section 2 of the report was written for a particular audience and, in the eyes of the Trust, would require clarification or qualification if it were to be published. Section 3 of the report was an analysis of various Trust business units, at a level and in a way which was not made public in the Trust's annual accounts, with a commentary and suggested stratagems.
37. The Council submitted that disclosure of Sections 2 and 3 of the report was therefore considered to be highly prejudicial to the Trust's operations, in part by revealing to Trust competitors (direct competitors in the case of gyms and fitness, performing arts, venue hire, classes and swimming lessons) their costs, prices, plans and strengths and weaknesses, thereby allowing those competitors to more easily target their activities to increase their market share at the Trust's expense. This would, in turn, likely impact on Trust income streams which, because its cost base was largely fixed and difficult to flex (mostly staffing costs), would mean its ability to balance its budget at year-end diminishing significantly (resulting in a probable need for the Council to cover the shortfall).
38. The Council also stated that the report included baseline assessments of current operating practices, weaknesses, and suggestions for remedial steps. Disclosure of this information would, it submitted, hamper the viability of the Trust.
39. The Council accepted that disclosing the introductory section of the report would not be prejudicial.

#### *Submissions from the Trust*

40. The Trust provided the Council with additional views on the potential disclosure of the report. The Trust was of the view that the fact that the report had not been signed off by the Board heightened its sensitivity. Given this status, it believed disclosure might give rise to conflict, dispute or disagreement, highlighting areas it considered particularly contentious.

#### *The Commissioner's findings on section 33(1)(b)*

41. The Commissioner has carefully considered the content of the withheld information, along with the submissions provided by the Council and the comments from the Trust. He accepts that the commercial interests of the Trust could be prejudiced substantially if disclosure of

certain parts of the report were to be disclosed, in particular those parts containing sensitive financial, budgetary and service activity trends and findings, which is not information already in the public domain.

42. He accepts that this type of information, if disclosed, could prejudice substantially the commercial interests of the Trust by undermining their plans and costings and allowing competitors an insight into their present and future planning, costing and projections. He has also taken into consideration that some of the analysis and conclusions in the report are disputed by members of the Trust Board and that detriment could be caused to the Trust by information which is not agreed, and may not be entirely accurate, being taken at face value were it placed in the public domain.
43. However, he does not accept that all of the information contained in the report would cause detriment to the commercial interests of the Trust. Some of the withheld information is innocuous in this respect: for example, information on whether the Trust has met budget expectations over previous years. This information could be found by checking the published accounts of the Trust. The Commissioner also fails to see how other information, consisting of generalised comment (e.g. a brief outline of the Corporate Structure and Governance of the Trust), could cause the degree of harm required under this exemption.
44. The Commissioner has therefore concluded that the exemption in section 33(1)(b) of FOISA was wrongly applied to some of the information in the report, and he requires the Council to disclose that information. A marked-up copy of the report is included with this decision and indicates which parts are to be disclosed.

### **The public interest test**

45. In relation to the information to which the exemption was correctly applied, the Commissioner must go on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

#### *Submissions from the Applicant*

46. The Applicant submitted that the public interest in disclosing the information outweighed that in maintaining the exemption. He stated that the Council and the Trust should both be open to public scrutiny and accountability. He was of the view that disclosure of the report would:
  - contribute to ensuring effective oversight of expenditure of public funds and ensuring that the public obtains value for money
  - contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions
  - ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims
  - contribute to a debate on a matter of public interest.

#### *Submissions from the Council*

47. The Council submitted that the public interest in the withholding of the report and maintaining commercial confidentiality outweighed that in disclosure.



48. The Council acknowledged that there was a public interest in disclosure insofar as the Trust benefitted from the public purse and so there was merit in the public having knowledge of what public money was being and would be spent on. There was also a public interest in knowing the nature and extent of future services the public might benefit from and in transparency in the business of the Trust, given its public funding.
49. However, the Council also argued that the Trust's fundamental objective was to provide the best possible quality and range of culture and leisure services to the people of East Renfrewshire, on behalf of the Council. It was therefore in the public interest that the Trust could develop and implement operational proposals to improve services, make them more attractive to users, generate greater customer numbers and, in turn, allow for further development of the services offered at reasonable price, all to the ultimate advantage of the local public (who would benefit from wider choice and more competitive costs). This, in turn, the Council stated, depended on continued and improved customer usage to generate income.
50. It was the Council's view that disclosure of information relating to the Trust's financial viability and opportunities for income generation (including consideration of matters hindering this objective) would have two major negative impacts on the Trust's commercial interests.
51. Firstly, it would provide prior notice to others in the market as to stresses on the Trust and what steps it might require to pursue in an attempt to remedy current issues. This would allow competitors to take their own competing steps that might have the effect of negating the benefit of the Trust's actions. As a result, disclosure might significantly disrupt the Trust's ability to provide innovation and consolidate a base in the marketplace, ultimately reducing its ability to develop services at reasonable cost to the public at large.
52. Secondly, the nature of some of the content of the report, which had not been approved by the Trust Board, could of itself have a negative impact on custom, again impacting on the Trust's ability to generate funds. This would run counter to the public interest in having access to quality facilities at a reasonable cost.
53. While accepting that the public had an interest in the proposed services and their impact on the public purse, the Council did not consider this to be prejudiced by withholding the report in question. This was because the financial business of the Trust and, indeed, of the Council in its financial support of the Trust, were and would continue to be subject to other reporting regimes accessible to the public, such as the agendas, reports and minutes of Council meetings. The Council provided the Commissioner with a link to examples of some of these, in the public domain, here:  
<http://www.eastrenfrewshire.gov.uk/CHttpHandler.ashx?id=19044&p=0>

#### *The Commissioner's conclusions*

54. The Commissioner accepts that it is in the public interest for there to be transparency in public spending: in this respect, he has taken into consideration the fact that there are other public reporting regimes which can satisfy this transparency to a degree.
55. Additionally, he has taken account of the fact that the Trust has disclosed an action plan which incorporates those recommendations arising from the report which are agreed to be clear and not misleading. He has also given a measure of weight to the fact that the report was not wholly signed off by the Trust Board and must consider whether putting a report into the public domain which has not been ratified as wholly correct would actually act against the public interest, by potentially misleading the public on certain issues.

56. While publishing the financial details and projections for the Trust would indeed inform the public, the Commissioner must also take into account that doing so would inform the Trust's competitors in the leisure marketplace, which would be likely to cause a degree of detriment to the Trust (which would not be in the public interest). The Council has raised genuine concerns about the Trust's competitive position here, which the Commissioner accepts as raising public interest arguments of genuine substance against disclosure, even if some of the apprehended consequences do appear to be somewhat overstated.
57. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure. He is of the view that the harm to the commercial interests of the Trust which would follow from disclosure of some of the information in the report outweighs the potential benefit to the public from its disclosure. The Commissioner therefore finds that the Council was correct to withhold some information in the report under section 33(1)(b) of FOISA.

## Decision

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The Commissioner finds that East Renfrewshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, in withholding some parts of the report, and by informing the Applicant that no further information was held in respect of related communications, the Council complied with Part 1 of FOISA.

However, by withholding other parts of the report and by failing to respond to the review requirement within 20 working days, the Council failed to comply with Part 1 (sections 1(1) and 21(1)) of FOISA.

The Commissioner therefore requires the Council to disclose to the Applicant those parts of the report as indicated in the marked up copy accompanying this decision, by 3 December 2019.

## Appeal

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Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

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If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**17 October 2019**

## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the Council.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or  
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the Council does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the Applicant notice in writing that it does not hold it.

...

#### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

### **33 Commercial interests and the economy**

(1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...



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